FILE COPY

SEP 8 19
MICHAEL RODAK, JR.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1972
NO. 72-211

LEWRON TELEVISION, INC.,

Petitioner,

- against -

UNITED NETWORK, INC. (Formerly called Jaymac, Inc.), Debtor, Individually and as General Partner of United Network Company, a Limited Partnership, and United Network Company, a Limited Partnership,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION

WILLIAM R. GLENDON
ROYALL, KOEGEL & WELLS
200 Park Avenue
New York, New York 10017
Counsel for Respondent

September 8, 1972

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1972
NO. 72-211

LEWRON TELEVISION, INC.,

Petitioner,

-against-

UNITED NETWORK, INC. (Formerly called Jaymac, Inc.), Debtor, Individually and as General Partner of United Network Company, a Limited Partnership, and United Network Company, a Limited Partnership,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statute Involved	3
Preliminary Statement	3
Statement of the Case	4
Argument	
I. This case involves no important question of federal or constitutional law	7
II. There is no conflict as to the construction of New York General Obligations Law §7-101	9
III. This Court should not construe New York General Obligations Law §7-101 in the absence of a ruling by the New York State courts	11
IV. There is no conflict as to whether on choice-of-law principles, New York General Obligations Law §7-101 applies	12
Conclusion	15

TABLE OF AUTHORITIES

Cases

	Page
Auten v. Auten, 308 N.Y. 155, 124 N.E. 2d 99 (1954)	14
Berenyi v. District Director, Immigration and Naturalization Service, 385 U.S. 630 (1966)	8
California v. Taylor, 353 U.S. 553 (1957)	12
E. L. Hoss Engineering Co. v. American Independent Oil Co., 183 F.Supp. 394 (S.D.N.Y. 1960), rev'd, 289 F.2d 336 (2d Cir. 1961)	14
Estate of Spiegel v. Commissioner, 335 U.S. 701 (1949)	11
Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271 (1949), opinion on rehearing, 339 U.S. 605 (1950)	8
Haag v. Barnes, 9 N.Y.2d 554, 175 N.E.2d 441, 216 N.Y.S.2d 65 (1961)	14
Huddleston v. Dwyer, 322 U.S. 232 (1944)	11
Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487 (1941)	13
Lawn v. United States, 355 U.S. 339 (1958)	12
Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387 (1923)	8
Lewron Television, Inc. v. D. H. Overmyer Leasing Co., 401 F.2d 689 (4th Cir. 1968), cert. denied, 393 U.S. 1083 (1969)	1, 9, 13
Mallory Associates v. Barving Realty Co., 300 N.Y. 297, 90 N.E.2d 468 (1949)	14

TABLE OF AUTHORITIES

Cases

	Page
Neely v. Eby Construction Co., 386 U.S. 317 (1967)	12
Rice v. Sioux City Memorial Park, Inc., 349 U.S. 70 (1955)	7
United States v. Johnson, 268 U.S. 220 (1925)	8

Statutes

New York General Obligations Law §7-101 .	2,6,7,9,10 11,12,13,14
New York General Obligations Law §7-103 .	11,14

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1972
NO. 72-211

LEWRON TELEVISION, INC.,

Petitioner,

- against -

UNITED NETWORK, INC. (Formerly called Jaymac, Inc.), Debtor, Individually and as General Partner of United Network Company, a Limited Partnership, and United Network Company, a Limited Partnership,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit is reported at 459 F.2d 556. The opinion of the United States Court of Appeals for the Fourth Circuit, to which the Petition refers, is reported in LewRon Television, Inc. v. D. H. Over-

myer Leasing Co., 401 F.2d 689 (4th Cir. 1968), cert. denied, 393 U.S. 1083 (1969).

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Questions Presented

1. Is there a conflict between the decisions of the United States Court of Appeals for the Second Circuit and the United States Court of Appeals for the Fourth Circuit as to whether the applicability of New York General Obligations Law §7-101 depends upon the parties' intention as to the nature of the payment?

Respondent submits that the answer to this question is No.

2. Is there a conflict between the decisions of the United States Court of Appeals for the Second Circuit and the United States Court of Appeals for the Fourth Circuit as to whether, under applicable choice-of-law principles, New York General Obligations Law §7-101 should be applied to the transaction involved in the instant case?

Respondent submits that the answer to this question is No.

3. Do these conflicts, even if they exist, call for a writ of certiorari in this case, which is an ordinary commercial case involving no important federal or constitutional issues?

Respondent submits that the answer to this question is No.

Statute Involved

The controlling statute is adequately set forth in the Petition.

Preliminary Statement

The Petition presents a commercial case involving no more than a simple claim under a New York statute. The claim was made by the respondent, a lessee of personal property, against the lessor of that property, here the petitioner. The lower courts ruled that under the lease and on the facts of the case the lessee is entitled to the protection of the statute. The United States Court of Appeals for the Second Circuit has affirmed that decision, and the result is that the lessor has had to refund certain deposit and advance rental payments to the lessee.

Now the petitioner-lessor is making a totally unfounded claim in this Court that there is a conflict between the Second and Fourth Circuits on an issue of interpreting the New York State statute and

concerning New York's choice of law rules. As demonstrated infra, the Petition distorts both the Second Circuit and the Fourth Circuit opinions in order to trump up a non-existent conflict.

Even if there were such conflicts between the circuit courts, it would nevertheless fall short of raising an issue of such moment and importance as to justify this Court's taking the case. It is respectfully submitted that this isolated case involving a relatively small sum, and turning on the interpretation of a state statute's application to a disputed set of facts, does not present a significant issue of federal or constitutional law or policy.

Respondent further submits that the lack of merit in the Petition is palpably apparent on the face of the document itself. For these reasons the Petition should be denied.

Statement of the Case

Respondent United Network, Inc. does not quarrel with the accuracy of the chronology of events as set forth in the Petition, although some of the Petition's colorative language is not supported by the record; and the Petition, as indicated below, mis-characterizes the holdings of the United States Courts of Appeals for the Fourth and Second Circuits.

The basic factual context of this Petition for certiorari is that in 1966 the D. H. Overmyer Leasing Co. planned to set up a fourth national television network. To obtain the necessary cameras and other equipment for this purpose, Overmyer entered into an equipment lease with LewRon Television, Inc., the claimant and petitioner herein. This lease agreement was subsequently amended by the parties, and Overmyer assigned its interest therein to the debtor United. Before going off the air, United operated LewRon's equipment for a total of five weeks, for which LewRon received $113,000, not including the amounts in dispute here.

This Petition involves $71,050 which was paid to the lessor LewRon by the lessee. Initially, $11,050, identified in the lease agreement as a deposit and designated to be applied to one of the rental payments, was paid to LewRon at the time the original lease agreement was signed. An additional $60,000, which the agreement specified was to be applied to the last four weeks' rental during the first 13-week term of the lease, was paid to LewRon at the time the parties entered into a major revision of the lease agreement, when the lease agreement was assigned to the respondent-lessee United.

There is no dispute that LewRon immediately commingled both payments with its other funds and that it entered these payments on its books variously as a "deposit", "advances" and "deferred rental income".

The issue here is whether these payments constituted deposits or advance rental payments within the provisions of the New York General Obligations Law §7-101. Under the terms of this statute, a lessor receiving such monies must segregate them and hold them in trust for the lessee. The parties do not dispute that under applicable New York law a lessor who commingles with his other funds monies governed by this statute commits a conversion and loses all right to retain the monies.

The Referee, then the United States District Court for the Southern District of New York and finally the United States Court of Appeals for the Second Circuit all held that the $71,050 was subject to the New York General Obligations Law, §7-101. The decision therefore was that, since the lessor LewRon had violated the provisions of that statute, the lessee United was entitled to the return of the money. It is that determination that LewRon seeks to overturn by having this Court review the case on certiorari.

Argument

POINT I

This case involves no important question of federal or constitutional law

The most striking consideration on this Petition for certiorari is that this is not the type of case which should come before this Court. It is nothing more than an ordinary commercial case, governed by state law and involving a relatively modest sum of money. It involves no federal question at all, and even if the case does present any real issue of state law it can hardly be considered one of great importance. The question that LewRon seeks to have this Court decide is simply whether, under the facts of this case, a statute of the state of New York, New York General Obligations Law §7-101, applies. There has been and can be no showing that the outcome of this case is a matter of concern to anyone beyond the parties immediately involved.* This Court has repeatedly indicated that it will not review on certiorari cases which are important only to the parties and do not involve issues of general importance to the public. E.g., Rice v.

* The only reason that two Courts of Appeals have dealt at all with the issues presented by this case is that LewRon itself has raised the same issues, arising out of the same set of events, in two different forums.

Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 79 (1955); and Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393 (1923).

Moreover, the application of §7-101 turns solely on a question of fact - whether the parties intended the monies in question to be deposits or advance rental payments of the type contemplated by the statute. The Referee, the United States District Court for the Southern District of New York and the United States Court of Appeals for the Second Circuit, on the basis of the evidence, concluded that §7-101 applies. It is the undeviating policy of this Court not to grant certiorari to review such factual determinations, United States v. Johnson, 268 U.S. 220, 227 (1925), particularly where there are concurrent findings by the District Court and the Court of Appeals. Berenyi v. District Director, Immigration and Naturalization Service, 385 U.S. 630, 635 (1966); and Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271, 275 (1949), opinion on rehearing, 339 U.S. 605 (1950).

Since this case involves no important issues of federal law or policy, but is an ordinary commercial case concerned solely with the application of a state statute under the unique facts here presented, this Court should decline to grant a writ of certiorari.

POINT II

There is no conflict as to the construction of New York General Obligations Law §7-101

LewRon asserts that this Court should grant a writ of certiorari because the Fourth Circuit and the Second Circuit have interpreted New York General Obligations Law §7-101, which has not been construed by the New York courts, in an inconsistent manner. LewRon argues that the Fourth Circuit held that the applicability of §7-101 depends in part upon the parties' intention as to the nature and purpose of the payment involved, whereas the Second Circuit held that the parties' intention is irrelevant. This is an incorrect characterization of the Second Circuit's opinion.

It is correct that the Fourth Circuit suggested (401 F.2d at 694) that the applicability of §7-101 "may depend in part on the intention of the parties as to the purpose of the payment" - i.e., whether or not it was intended to be a deposit or advance rental payment so as to be within the scope of the statute. It is not correct, however, as LewRon asserts at page 11 of the Petition, that the Fourth Circuit "emphasized...that the parties did not intend the $60,000 payment to constitute the type of payment

to which Section 7-101 applies." There is simply nothing to that effect in the Fourth Circuit opinion. Moreover, the Second Circuit did not hold that the parties' intention as to the nature and purpose of the payment is irrelevant in determining whether it is a deposit or advance within the meaning of §7-101. On the contrary, the Second Circuit specifically held that the parties clearly intended the $60,000 payment to be a "deposit or advance on future liabilities so as to come under §7-101" (459 F.2d at 561).* It held that the nature of the $60,000 payment was so clear from the face of the agreement that resort to intrinsic evidence as to the parties' intent was unnecessary; but, in any event, that evidence only confirmed that the parties intended the payment to be a deposit or advance rental payment (459 F.2d at 562), a finding which was well supported by the extrinsic evidence alone.

---

* Not surprisingly, LewRon sloughs off the question of the $11,050 payment, which is identified in the lease agreement itself as a deposit, since there was and could be no suggestion in either opinion that this payment was not within the terms of §7-101.

This Court should not construe New York General Obligations Law §7-101 in the absence of a ruling by the New York state courts.

Even if, contrary to fact, there were a conflict between the Fourth Circuit and Second Circuit opinions, this is not an appropriate case for this Court to review on certiorari. Section 7-101, as LewRon emphasizes in its Petition, has not been construed by the New York courts, and this Court does not ordinarily undertake to decide questions of state law in advance of an authoritative pronouncement by the courts of the state involved. Huddleston v. Dwyer, 322 U.S. 232, 237 (1944). Moreover, the federal courts in New York are regarded as the "experts" in New York law, within the federal judicial system, and this Court does not usually question their judgment in such matters. Estate of Spiegel v. Commissioner, 335 U.S. 701, 707-08 (1949); and Huddleston v. Dwyer, supra, at 237.

Beyond this, in interpreting §7-101, both federal courts in New York recognized that this provision deals with personal property leases and a companion section (§7-103) contains almost identical provisions but applies to real property leases. The latter realty statute has been interpreted by the New York courts many times; and all parties in this case, along with the lower courts, have recognized that the §7-103 decisions are largely applicable in their reasoning to the interpretation of the §7-101 companion section here involved.

POINT IV

There is no conflict as to whether, on choice-of-law principles, New York General Obligations Law §7-101 applies

LewRon argues that this Court should grant a writ of certiorari because the Fourth Circuit suggested that under New York choice-of-law rules the instant transaction might not have sufficient contacts with New York to justify applying §7-101, whereas the Second Circuit held that sufficient contacts did exist.

In the first place this is an improper argument on LewRon's part, inasmuch as it did not argue or brief this question in any court below and these courts did not, therefore, decide it. United, out of an abundance of caution and because the Fourth Circuit had raised the point, did brief this issue before the Referee and the District Court, but neither the Referee nor the District Court nor, of course, the Court of Appeals addressed itself to the issue. Therefore, the question of whether the transaction had sufficient contacts with New York to justify applying §7-101 is not properly before this Court and cannot furnish grounds for a writ of certiorari. E.g., Neely v. Eby Construction Co., 386 U.S. 317, 330 (1967); Lawn v. United States, 355 U.S. 339, 362-63, n. 16 (1958); and California v. Taylor, 353 U.S. 553, 556-7, n. 2 (1957).

Even if the issue were properly before this Court, it would still furnish no grounds for issuing a writ of certiorari. The Fourth Circuit did not hold, or even suggest, that the transaction lacked sufficient contacts with New York. It merely stated, in remanding the case for trial,* that the record before it was too scanty to reach a decision on the question (401 F.2d at 694). The Second Circuit and the courts below, on the other hand, had before them a complete and voluminous record. Insofar as the issue was before them at all, they evidently concluded, applying New York choice-of-law principles, Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487 (1941), that the transaction had enough contacts with New York to justify applying §7-101.

This conclusion finds ample support in the record and is clearly correct. In the first place, the parties expressly agreed in the contract that New York law was to govern. Moreover, United Network is a New York limited partnership and maintained its principal office in New York City. The original $11,050 deposit payment was transmitted from New York with an

* Because of United's pending reorganization proceedings, wherein both LewRon and Overmyer also were involved, all parties stipulated that the trial herein would be the trial on the issues for all purposes among them.

original copy of the agreement which had been signed there by Overmyer, which also maintained its office in New York. The $60,000 payment was made in New York and the critical amendment to the lease was negotiated and executed there. It is thus apparent that New York is the site of most of the significant contracts with the transaction and especially with the deposit payments.

Under such circumstances, and particularly where the parties have indicated their intention to follow New York law, it is clear that New York substantive law should apply. Haag v. Barnes, 9 N.Y.2d 554, 559-60 175 N.E.2d 441, 443-44, 216 N.Y.S.2d 65, 68-69 (1961); and E. L. Hoss Engineering Co. v. American Independent Oil Co., 183 F.Supp. 394, 399 (S.D.N.Y. 1960), rev'd on other grounds, 289 F.2d 336 (2d Cir. (1961). The very case on which petitioner relies, Mallory Associates v. Barving Realty Co., 300 N.Y. 297, 90 N.E.2d 468 (1949), holds that §7-101's corresponding statute dealing with deposits or advance rental payments in leases of real property, New York General Obligations Law §7-103, can apply when, as here, the leased property is located outside the State of New York.

Conclusion

For the foregoing reasons, the Petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be denied.

Dated: September 8, 1972

Respectfully submitted,

WILLIAM R. GLENDON
ROYALL, KOEGEL & WELLS
200 Park Avenue
New York, New York 10017
Counsel for Respondent